No. 88-961 (2)

Supreme Court, U.S.
FILED
JAN 20 1989
JOSEPH E. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1988

MICHAEL L. SCHMIDT,

Petitioner,

vs.

STATE OF GEORGIA,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of Georgia

BRIEF IN OPPOSITION FOR THE RESPONDENT

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QUESTION PRESENTED

I.

Whether this Court should decline to grant a Writ of Certiorari to examine the Georgia Court of Appeals' determination that the trial court correctly denied Petitioner's Motion to Suppress Evidence?

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BRIEF IN OPPOSITION FOR THE RESPONDENT

PART ONE
(i)
STATEMENT OF THE CASE

The Petitioner, Michael L. Schmidt, was found guilty of trafficking in cocaine in the Superior Court of Gordon County in September, 1987. Pursuant to O.C.G.A. § 16-13-31; Ga. Code Ann. § 79A-811, Petitioner was sentenced to thirty (30) years imprisonment, twenty-five years to serve and the remainder on probation. Additionally, Petitioner was fined five hundred thousand dollars ($500,000). (R.4-5).

On direct appeal, the Court of Appeals determined that Petitioner was properly stopped, and properly arrested. *Schmidt v. State*, 188 Ga. App. 85, 372 S.E.2d 440 (1988). The Supreme Court of Georgia denied a Petition for Writ of Certiorari and denied Petitioner's Motion for Rehearing. Thereafter, Petitioner filed the instant Petition for Writ of Certiorari requesting that this Court review the decision of the Court of Appeals.

(ii)
STATEMENT OF FACTS

At Petitioner's bench trial conducted September 24, 1987, the parties stipulated to the evidence presented at the hearing on Petitioner's Motion to Suppress. The facts of the case as established by the evidence before the Court, and as succinctly reiterated on direct appeal by the Court of Appeals of Georgia, revealed that during the early morning hours of November 4, 1986, Petitioner was traveling northbound on Interstate 75 through Georgia. Georgia State Trooper Ralston observed that the Petitioner was traveling at a speed of 64 miles per hour.[1] Because Petitioner was traveling in excess of the speed limit, State Trooper Ralston stopped the Petitioner. The stop was made at 2:18 a.m. (Motion to Suppress transcript, hereinafter M.S.T., 9).

[1] The speed limit at the time was 55 mph.

[Petitioner] was advised he had been speeding and was asked to produce a driver's license and vehicle registration. [Petitioner] gave Ralston a valid Illinois license; he also gave him a rental agreement for the Thunderbird.

[Petitioner] told Ralston he was unemployed; that he was a college student in northern Illinois; and that he was returning from central Florida where he had gone to purchase an automobile. . . . In this regard [Petitioner] told Ralston that automobiles could be bought cheaper in Florida and that was why he went there. Examining the rental agreement, Ralston observed that [Petitioner] rented the Thunderbird on October 29, 1986 and that was not the first automobile he had rented. He also noticed that the rental price of the automobile was $290.00 per week (plus $.25 per mile after the first two hundred miles per day) and that [Petitioner] put down a $300.00 cash deposit on the automobile. . . .

Ralston gave [Petitioner] a written warning for the speeding violation. He returned the driver's license and rental agreement to [Petitioner].

[Petitioner] was asked if he would give his consent to a search of the automobile, although he said he was in a hurry, [Petitioner] gave oral permission for a search. Then [Petitioner] signed a written consent to search form. The form was signed at 2:30 a.m.

Searching the automobile, Ralston obtained the road maps and found two motel bills. On the road maps, the route from Chicago to Miami was highlighted. One motel bill showed that the [Petitioner] made more than twenty telephone calls to Chicago during his stay. The other motel bill showed that [Petitioner] was in Miami for two days during the previous summer and that he made several calls to Chicago at that time.

Ralston removed the key from the ignition and went to open the trunk. The ignition key did not fit and

> Ralston asked [Petitioner] for the key to the trunk. According to Ralston, [Petitioner] replied that he was given only one key by the rental agency. . . .
>
> [Ralston indicated] that he was going to remove the rear seat to search the trunk. [Petitioner] objected, expressing concern about the taking apart of a rental automobile.
>
> Ralston explained that he could remove the seat simply, in a matter of minutes. Nevertheless, [Petitioner] withdrew his consent to search. Then, Ralston advised [Petitioner] that he would have to be detained until the arrival of a drug dog and a magistrate. Because [Petitioner] was not dressed warmly, Ralston suggested that he wait in the patrol car. [Petitioner] did so. In Ralston's mind, [Petitioner] was no longer free to leave. The time was 2:45 a.m.
>
> Approximately a half-hour later, a drug dog and handler arrived. A magistrate was already on the scene. When the dog alerted, the magistrate executed a warrant to search the automobile.

Schmidt v. State, 188 Ga. App. at 85-86. Ralston's search revealed the presence of 4 kilos (4,002 grams) of cocaine. Petitioner was arrested for violating the Georgia Controlled Substances Act and, as presented above, Petitioner was duly convicted and sentenced in accordance with state law.

Further facts may be developed herein as necessary for a more thorough illumination of the issue presented to this Court.

PART TWO

REASONS FOR DENYING THE WRIT

A. The Court Of Appeals Of Georgia Properly Determined That There Was No Impropriety In The Stop, Detention, And Eventual Arrest Of The Petitioner For Transporting 4,000 Grams Of Cocaine.

The Petitioner contends that the trial court improperly denied his Motion to Suppress Evidence, particularly, the cocaine found in the vehicle driven by the Petitioner. Petitioner contends that the evidence should have been suppressed because the "prolonged" duration of detention after the Petitioner was stopped was not justified, and because no probable cause to arrest existed during the detention. Petitioner claims that he was, in effect, improperly arrested without probable cause during the detention period. Respondent asserts that the Court of Appeals of Georgia properly determined that the Motion to Suppress Evidence was without merit.

A review of the record in this case reveals that after a suppression hearing, the trial court denied the Motion to Suppress holding that Petitoner consented to the search of his automobile. (R.6). The Court of Appeals of Georgia determined that the stop, detention, and arrest of Petitioner was valid in that during the detention period probable cause existed for the arrest of the Petitioner. *Schmidt v. State*, 188 Ga. App. at 88. Respondent submits that contrary to Petitioner's assertions, the decision of the Court of Appeals does not abrogate any Fourth Amendment protection, but, rather, is consistent with long established precedent from this Court.

I.

The Fourth Amendment to the United States Constitution does not prohibit all searches and seizures, but only unreasonable searches and seizures. *See United States v. Sharp*, 470 U.S. 675, 682 (1985). The Court has, on numerous occasions, given guidance on the type of search and seizure which is permissible. In *Terry v. Ohio*, 392 U.S. 1 (1968), the Court determined that it would be permissible for an officer to conduct a limited search – a pat-down for weapons – for the protection of an officer investigating the suspicious behavior of an individual he believed to be armed and dangerous. The Court approved the limited search on facts which would not constitute probable cause to arrest based upon the balance between the public interest in law enforcement and safety as opposed to the individual's right to be free from arbitrary interference by law officers. *Terry v. Ohio*, 392 U.S. at 20-21.

In *Adams v. Willams*, 407 U.S. 143 (1972), the Court elaborated on the rule of law announced in *Terry v. Ohio*. The Court recognized that "a brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time." *Adams v. Williams*, 407 U.S. at 145-46. The Court noted, over a decade ago, that *Terry v. Ohio* and *Adams v. Williams* "established that in appropriate circumstances the Fourth Amendment allows a properly limited 'search' or 'seizure' on facts that do not constitute probable cause to arrest or to search for contraband or evidence of crime." *United States v. Brignoni-Ponce*, 422 U.S. 873, 881 (1975). Further, the Court

recognized that an officer is entitled to assess the facts and circumstances of a particular incident in light of his experience. *Id.* at 885.

Officers are permitted to rely upon their training and experience in that a trained law enforcement agent can perceive and articulate meaning and conduct which to the untrained observer would appear wholly innocent. *United States v. Mendenhall*, 446 U.S. 544, 563 (1980). Courts are implored not to ignore the considerable expertise of law enforcement officials in detecting criminal activity such as drug smuggling. *Id.* at 566. Law enforcement officials are entitled to assess the facts in light of their experience, and courts are implored not to ignore the expertise of law enforcement officials because, *inter alia*,

> [m]uch of the drug traffic is highly organized and conducted by sophisticated criminal syndicates. The profits are enormous. And many drugs, including heroin, may be easily concealed. As a result, the obstacles to detection of illegal conduct may be unmatched in any other area of law enforcement.

Id. at 561-62.

Realizing the difficulty of ferretting out crime, especially drug smuggling, and weighing the balance between public safety and an individual's right to be free from an unreasonable search and seizure, the Court has held that brief detention for limited investigation may be necessary on facts which will not amount to probable cause to arrest.

> Without such investigation, those who are innocent might be falsely accused, those who are guilty might wholly escape prosecution, and many crimes would

> go unresolved. In short, the security of all would be diminished.

United States v. Mendenhall, 446 U.S. at 554. Therefore, it is clear from the Court's opinions that not all seizures of a person must be justified by probable cause to arrest. *Florida v. Royer*, 460 U.S. 491, 498 (1983). Indeed, it is clear that reasonable suspicion of criminal activity will warrant an officer in temporarily detaining an individual for the purpose of conducting a limited investigation. *Florida v. Royer*, 460 U.S. at 498; *United States v. Brignoni-Ponce*. The limited detention for investigative purposes does not abrogate the protection of the Fourth Amendment in that law enforcement officials must conduct their limited investigation by the least intrusive means, and action approaching the condition of arrest is prohibited. *Dunaway v. New York*, 442 U.S. 200 (1979).

In *Florida v. Royer*, the Court made clear that an investigative detention must last no longer than what is necessary, and the means employed should be the least intrusive available to verify or dispel the officer's suspicion. 460 U.S. at 500.

In *United States v. Sharp*, the Court focused on the nature of the detention and those factors which would separate a permissible detention from an improper de facto arrest. The length of the detention is not necessarily controlling; it is not necessary for officers to allow stopwatches to govern a legitimate effort to detect criminal activity. Rather than focusing solely on time, the Court has "emphasized the need to consider the law enforcement purposes to be served by the stop as well the time reasonably needed to effectuate those purposes." *United States v. Sharp*, 470 U.S. at 685. In this regard, the Court

stated that common sense and ordinary human experience must govern over rigid criteria.

> If the purpose underlying a *Terry* stop – investigating possible criminal activity – is to be served, the police must under certain circumstances be able to detain the individual for longer than the brief time period involved in *Terry* and *Adams* [citation omitted].

United States v. Sharp, 470 U.S. at 685-86, *quoting Michigan v. Summers*, 452 U.S. 692 (1981). Accordingly, the length of the detention is not necessarily controlling. Rather, the Court is concerned with the events which occur during the detention.

As stated earlier, a permissible detention seeks to confirm or dispel an officer's suspicion in a short period of time in the manner least intrusive to the individual. *Florida v. Royer*, 460 U.S. at 500. However, the Court has recognized that during a prearrest detention, it may be necessary for officers to graduate their response to the demands of the particular situation, and to additional information received during investigation. *See United States v. Sharp*, 470 U.S. at 687.

A review and summary of the above-cited cases shows a clear and consistent policy from the Court. First, the Fourth Amendment does not prohibit all searches and seizures, only unreasonable ones. Second, it is permissible for law enforcement officials to detain an individual based upon reasonable suspicions to conduct a limited investigation which should be no more intrusive than is necessary. Third, law enforcement officials need not be tied to a specific time period; the circumstances and actions of the officers will determine the need for detention and whether the least intrusive means was utilized.

Fourth, somewhat longer detention may be necessary based upon an officer's graduated response to the demands of the particular situation. Finally, an officer is allowed to rely upon his training and experience in gauging whether a stop is necessary, and courts should not ignore an officer's experience in determining whether a brief detention and limited investigation are necessary. Of course, the overriding concern in application of the rules set forth by the Court is that an individual's Fourth Amendment right to be free from unreasonable search and seizure not be violated. Accordingly, a detention which is in effect a de facto arrest, or actions taken by an officer which are intrusive considering the circumstances of the case, are not permissible.

II.

In the instant case, Respondent submits that Trooper Ralston properly stopped, detained, and arrested the Petitioner in accordance with longstanding precedent from the Court.[2]

A. The Stop

In the Petition for Writ of Certiorari, the Petitioner does not dispute the propriety of Trooper Ralston's initial

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[2] The Court of Appeals held that the detention of the Petitioner was not a justifiable *Terry v. Ohio* stop. While Respondent concurs in the decision of the Court of Appeals, to wit, that the trial court properly denied the Motion to Suppress, Respondent also shows that the detention of the Petitioner was proper under *Terry v. Ohio* and its progeny.

stop of the Petitioner. A review of the facts as reported by the Court of Appeals reveals that the stop was proper. During the early morning hours of November 4, Trooper Ralston observed Petitioner's car exceeding the speed limit. Because Petitioner was not abiding by the speed limit, Trooper Ralston properly stopped Petitioner. At the hearing on the Motion to Suppress, Petitioner did not contest Trooper Ralston's determination that he was speeding. (MST-111).

Petitioner was stopped for speeding. Accordingly, the *Terry v. Ohio* requirement of reasonable suspicion for the initial stop does not apply in this case. In accordance with the above facts and analysis, Respondent submits that Petitoner was properly stopped.

B. The Detention

After Petitioner was stopped for speeding, he informed Trooper Ralston that he was unemployed, that he was a college student in northern Illinois, and that he was returning from central Florida where he had gone to purchase an automobile. Trooper Ralston examined Petitioner's license and the car rental agreement. Additionally, the Trooper observed the inside of Petitioner's vehicle which contained road maps, a small travel bag, and fast food trash. (MST-57). Petitioner was issued a warning citation for speeding and Petitioner's license and rental agreement were returned to him. Because Trooper Ralston's suspicions were aroused from the conversation with the Petitioner, he asked Petitioner for permission to search the vehicle. Petitioner voluntarily consented to a search of the vehicle and signed a waiver

form. (MST-12-14). While Trooper Ralston searched the inside of the vehicle, for the comfort of the Petitioner, who was not dressed warmly, Trooper Ralston allowed Petitioner to sit in the patrol vehicle. During the search of Petitioner's vehicle, Trooper Ralston observed two maps which highlighted routes from Chicago to Miami. Additionally, Trooper Ralston observed two motel receipts, one of which indicated Petitioner stayed in Miami from October 31, 1986 to November 3, 1986. (MST-24). The motel receipt revealed that Petitioner made numerous calls to the Chicago area while in Miami. The second motel receipt revealed that Petitioner had previously visited Miami and, while there on the previous occasion, made several calls to Chicago.

In order to complete a thorough search of the vehicle, which search was at this point consented to by the Petitioner, Trooper Ralston removed the key from the ignition and attempted to unlock the trunk. The ignition key did not unlock the trunk of the vehicle. The Petitioner was asked for the trunk key and Petitioner responded that the rental company had only given him one key. (MST-17).[3] In order to effectuate a thorough search of the automobile, Trooper Ralston informed the Petitioner that he could gain entrance to the trunk area by removing two bolts from the back seat. However, Petitioner objected and, in effect, withdrew his consent to search. Trooper Ralston advised Petitioner that he would have to be detained for further investigation. (MST-18). It is at this

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[3] At the hearing on the Motion to Suppress, Petitioner claimed that he lost the key. (MST-116).

point, approximately 2:45 a.m., that the detention of which Petitioner complains begins. The detention only begins at this point in that the Trooper made a valid stop for a traffic violation which was followed by a search of Petitioner's vehicle pursuant to Petitioner's consent in an apparent spirit of voluntary cooperation. *See Sibron v. New York*, 392 U.S. 40 (1968). Petitioner was detained at that point when he objected to a further search of his vehicle.

In order to determine if the detention was proper, the Court of Appeals of Georgia considered what facts the experienced trooper knew at the time of the detention.

> Ralston knew that [Petitioner] was headed north after spending several days in Miami, a known drug-source city; that [Petitioner] made a prior trip to Miami in the summer; that [Petitioner] made numerous calls from Miami to Chicago; and, importantly, that [Petitioner] lied about his whereabouts. [Trooper Ralston] also knew that certain statements made by [Petitioner] sounded fishy. [Petitioner] said he was unemployed and that he was looking to purchase an automobile in Florida because they could be purchased cheaper there. Yet, [Petitioner] was driving an expensive rental automobile and he had rented an automobile previously. [Petitioner] said he was a student. Yet, [Petitioner] was traveling at a time when students are usually in school and he was taking a week off to drive to Miami. Moreover, [Petitioner's] statement that he was only given one key by the rental company was an obvious excuse to prevent Ralston from opening the trunk.

Schmidt v. State, 188 Ga. App. at 88. In addition to the above, in Trooper Ralston's experience in detecting crime, he had observed that in instances where an individual

failed to produce a trunk key, narcotics were usually found in the vehicle. (MST-27).

Considering the above factors, and based upon his experience, Trooper Ralston requested a drug detection dog and a magistrate. Both arrived on the scene within thirty (30) minutes of the time Petitioner was detained. Shortly after the drug detection dog arrived, he "alerted" for the presence of narcotics in Petitioner's vehicle.

Respondent submits that the brief unintrusive detention of the Petitioner was proper and in accord with decisions of this Court. As was noted in subsection I, an investigative detention must last no longer than what is necessary for the purpose of the stop. The methods employed during the detention should be the least intrusive means available. *Florida v. Royer,* 460 U.S. at 500. In the instant case, once Petitioner objected to the further search of his vehicle, Trooper Ralston ceased his search and called for a magistrate and drug detection dog. Both arrived in less than thirty (30) minutes. Respondent submits that the time frame involved, thirty (30) minutes, did not convert the detention to a de facto arrest in that the dog handler and the magistrate were called during the early morning hours regarding the stop of the Petitioner. According to the dog handler, it took twenty (20) minutes to travel from his location to where Trooper Ralston and the Petitoner were located. (MST-91). After being awakened at 2:45 a.m., he arrived at 3:11 a.m. It is evident from the above facts that the dog handler acted expeditiously after receiving the call from Trooper Ralston. As for the use of a drug detection dog, Respondent notes that on a previous occasion, the Court has recognized that use of a trained drug detection dog may be an expeditious, yet

unintrusive way of determining the presence of narcotics. *Florida v. Royer,* 460 U.S. at 505.

In addition to acting expeditiously in contacting the magistrate and dog handler, Respondent notes that during the detention of the Petitioner, Petitioner was not abusively handled, there was no intrusive probing into Petitioner's vehicle, and Trooper Ralston made arrangements for Petitioner's comfort while awaiting the arrival of the magistrate and dog handler.

Respondent submits, based upon the above, that (1) based upon his experience, conversation with the Petitioner and items found in Petitioner's car during a consensual search, Trooper Ralston determined that Petitioner could be involved in criminal activity; (2) after detaining Petitioner, Trooper Ralston acted expeditiously and decisively in attempting to minimize the intrusion imposed upon Petitioner while furthering the investigation; (3) Trooper Ralston pursued a course of action which would resolve the issue either for or against the Petitioner in the least intrusive means; and (4) the entire length of the detention, thirty (30) minutes, was due in part to the time of the incident, i.e., the early morning hours, and the length of time necessary for the dog handler to arrive at the scene. For all of the above reasons, it is apparent that the detention in the instant case is distinguishable from a traditional arrest. Accordingly, Respondent submits that, in line with this Court's decision in *United States v. Sharp, Florida v. Royer,* and other cases cited herein, the detention of the Petitioner was appropriate.

C. The Arrest

After the drug detection dog alerted for the presence of narcotics in Petitioner's vehicle, the magistrate issued a search warrant. Pursuant to the search warrant, Trooper Ralston removed the back seat of Petitioner's vehicle and found 4 kilos of cocaine in the trunk. Thereafter, Petitioner was arrested.

Because the search warrant was issued when a reliable drug detection dog alerted for the presence of narcotics, and because of the discovery of cocaine in Petitioner's trunk, Respondent submits that probable cause for the arrest of the Petitioner existed.

III.

In its decision affirming the trial court's denial of the Motion to Suppress, the Court of Appeals held that a thirty (30) minute detention of the Petitioner by Trooper Ralston constituted an arrest. Further, the Court of Appeals determined that "[t]he particular facts and circumstances of the case . . . were sufficient to establish probable cause for an arrest." *Schmidt v. State*, 188 Ga. App. at 88. While Respondent does not disagree with the Court of Appeals ultimate decision, i.e., that the Motion to Suppress was properly denied, Respondent submits that pursuant to this Court's decisions as cited above, the detention of the Petitioner was appropriate. Because the ultimate decision of the Court of Appeals of Georgia was correct, this Court should not grant certiorari. As stated in *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 566 (1977),

> [o]ur power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of the federal laws, our review would amount to nothing more than an advisory opinion.

See also Herb v. Pitcairn, 324 U.S. 117 (1945).

Because the detention of the Petitioner prior to his arrest was appropriate, Respondent submits that this Court need not consider the issue of whether probable cause existed during the detention period. If the Court were to consider this issue, it would, in fact, be rendering an advisory opinion which would not affect the judgment rendered by the state court.

CONCLUSION

It is evident from a review of the record that Trooper Ralston properly stopped, detained, and ultimately arrested the Petitioner. Accordingly, the Court of Appeals' decision upholding the trial court's denial of Petitioner's Motion to Suppress was proper.

This Court should refuse to grant the Writ of Certiorari to the Court of Appeals of Georgia as it is manifest that there exists for review by this Court no substantial federal question not previously decided by the Court. Additionally, the decision sought to be reivewed is in accord with applicable and recent decisions of the Court.

Respectfully submitted,

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